National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 14 1998

TO: Sandra Dunbar, Regional Director, Region 3

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Wesley Wendt, d/b/a Vernon Downs Food Service, Case 3-CA-21377

133-8700, 260-3390, 260-6776

This case was submitted for advice as to whether the Board should assert jurisdiction over a food concession operator at a horse racing facility.(1)

FACTS

The Employer is required by the New York State Racing and Wagering Board to obtain a vendor's license, have each employee licensed (a process that includes photographing and fingerprinting) and file weekly reports, though the latter regulation is not enforced. Neither the Racing and Wagering Board nor racetrack management is involved in the day-to-day operation of the Employer's business. Wendt holds a first mortgage on the racetrack, to secure an arms-length loan he made when the Racing and Wagering Board required the track to secure additional funding. However, Wendt is not involved in the management of the racetrack.

The Union alleges that the Employer violated Section 8(a)(1) and (5) by interrogating and threatening employees refusing to bargain with the Union, and making unilateral changes in terms of employment.(2) The Employer contends that the Board should not assert jurisdiction over the alleged unfair labor practices, because the Employer's operation is integrally related to the horse racing industry, over which the Board has declined to assert jurisdiction.

ACTION

We conclude that the Board will assert jurisdiction over the Employer.

The Board's jurisdiction over labor disputes is coextensive with the full reach of the Commerce Clause.(3) The only specific statutory limitations on the Board's jurisdiction are contained in Section 2 of the Act, which excludes certain employers such as government entities and employers subject to the Railway Labor Act.

The Board, however, has never exercised its statutory jurisdiction to the full extent, but has rather limited it to labor disputes and employers that have more than a minimal effect on interstate commerce.(4) The Board's discretionary declination of jurisdiction is based on Section 14(c)(1) of the Act, which authorizes the Board to decline jurisdiction over employers when the Board deems their effect on interstate commerce "not sufficiently substantial to warrant the exercise of its jurisdiction."

Under Section 14(c)(1), the Board has declined to assert jurisdiction over certain classes of employers. At one time, the Board excluded many enterprises, including non-profit corporations, law firms, construction companies hotels, hospitals, and abortion clinics.(5) However, in more recent years the Board has expanded the discretionary exercise of its jurisdiction. Currently, the only employers over which the Board declines jurisdiction as a class are foreign flag ships and certain employers closely connected to foreign governments; religious organizations (except when engaged in activities that are commercial in nature); and the horseracing and dogracing industries.(6) The Board's declination of jurisdiction over the horseracing and dogracing industries is based in part on the extensive degree of state control over those industries.(7)

The Board has also declined to assert jurisdiction over employers whose operations are an integral part of the horseracing industry, and found in one case that a food concession at a racetrack had that integral relationship. Thus, in Hotel & Restaurant Employees, Etc., Local 343 (Herman Turner and Resort Concessions),[(8)] the Board declined to assert jurisdiction over an employer whose business consisted solely of food and beverage concession operations at a New York racetrack. The Board held that the employer's food services, "while not absolutely essential to the functioning of the racetrack, are an integral attribute of a facility such as a racetrack..." The Board noted that the services were expected and demanded by racetrack patrons. The Board further noted that the employer had a close identification with the racing industry as it operated solely at the racetrack and was subject to regulation by the state racing commission. For those reasons, the Board found that the employer's operations were inextricably associated with those of the raceway.

However, the Board has not subsequently relied on Resort Concessions and, consistent with its current, more expansive view of its jurisdiction, has distinguished it in several cases. In Ogden Food Service Corporation,[(9)] the Board, in asserting jurisdiction over a racetrack food service establishment that also operated numerous other track and non-track facilities, concluded that the employer's restaurant and concession operations were "not integrally related to the operations of the racetracks at which it is located."[(10)] The Board distinguished Resort Concessions as involving a situation where the concessionaire barely met the Board's monetary jurisdiction standard, operated for only 4 months of the year, and operated exclusively at a single racetrack.

Additionally, in American Totalisator Co.,[(11)] the Board asserted jurisdiction over an employer that manufactured and serviced equipment used in pari-mutuel betting at racetracks. In holding that the employer's operation was not integrally related to the horseracing industry, the Board found crucial the fact that the employer was an "independent entity with its own employees who are hired supervised, assigned, and transferred without any input from the owners of the racetracks."[(12)]

Recently, in Prairie Meadows Racetrack & Casino,[(13)] the Board exercised jurisdiction over a large casino that also operated an adjunct racetrack, and noted that the employees the union sought to represent -- including kitchen and banquet workers, bartenders, food servers, bussers, and concession attendants -- were employees "not traditionally associated with or functionally integrated with horseracing." The Board indicated that the horseracing exception applied only where racetrack employees such as jockeys, trainers, grooms, and pari-mutuel betting agents were involved.

Thus, the Board apparently no longer considers retail services such as food concessions to be "integral" attributes of a racetrack, precluding assertion of jurisdiction, merely because those services are expected by racetrack patrons. Here, the Employer operates an independent food concession business, without the racetrack's interference, and utilizes a stable, almost year-round workforce of food service workers who are in no way involved in the racing industry. Under these circumstances, we conclude that the Board should, and will exercise jurisdiction to remedy the Employer's unfair labor practices.

We recognize that the Board's declination of jurisdiction over the horseracing industry is based in part on the extensive degree of state control over that industry and that New York does license and regulate racetrack concessionaires like the Employer. However, the state's regulation of food concessionaires at racetracks is not nearly as extensive as its regulation of the racing and betting operations.[(14)] Furthermore, state regulation of an employer does not preclude the Board from asserting jurisdiction. In Volusia Jai Alai,[(15)] the Board asserted jurisdiction over a Florida jai alai fronton despite extensive state regulation which included licensing requirements for all employees and a procedure under which employees could appeal to the State any employer personnel decisions such as discharges and suspensions.

Although the Board has in some cases emphasized that jurisdiction over a concessionaire was appropriate because it operated businesses at multiple locations, the fact that the Employer operates exclusively at a single racetrack would not, in our view, cause the Board to decline jurisdiction so long as the Employer is not integrally related to that racetrack's business.[(16)] Nor would jurisdiction be declined because the Employer has helped to finance the racetrack's operations, since the Employer's arms-length loan to the racetrack operator would not in itself render the independent, separately-operated food concession an integral part of the racing industry.[(17)] Accordingly, we conclude that the Board will assert jurisdiction over the Employer, and the Region should issue a complaint, absent settlement.

B.J.K.

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[1] The Region's request for Section 10(j) injunctive relief will be addressed in a separate memorandum.

[2] The Region did not submit these allegations for advice. The Union has also filed an identical charge with the New York State Labor Relations Board. Complaint has issued in that case and a hearing is scheduled for August 24 and 25 1998.

[3] Guss v. Utah Labor Board, 353 U.S. 1, 3 (1957).

[4] International Broth. of Electrical Workers, No. 1501 v. American Totalisator, 529 F.Supp. 419, 420 (D.Md. 1982).

[5] See, *e.g.*, Medical Center Hospital, 168 NLRB 266 (1967); Choice, Inc., 212 NLRB 550 (1974); Foley, Hoag & Eliot, 229 NLRB 456 (1977); St. Aloysius Home, 224 NLRB 1344 (1976).

[6] Horseracing and dogracing are the only class excluded pursuant to Board regulations. See 29 C.F.R. 103.3 (1973).

[7] Delaware Park, 325 NLRB No. 12, slip op. at 1 (1997) (Chairman Gould dissenting).

[8] 148 NLRB 208 (1964).

[9] 234 NLRB 303 (1978).

[10] Id. at 303. See also Harry M. Stevens, 169 NLRB 806 (1968); Waterford Park, 251 NLRB 874 (1980).

[11] 264 NLRB 1100 (l980).

[12] Id. at 1101. See also Harry M. Stevens, 169 NLRB at 807-808 (fact that employer, not racetrack, directly supervised food concession employees was a factor in the Board's assertion of jurisdiction). Compare Chelsea Catering, 309 NLRB 822 (1992) (Board deferred jurisdiction to National Mediation Board under the Railway Labor Act where catering business was subject to extensive control by the airline).

[13] 324 NLRB No. 91, slip op. at 3 (1997).

[14] See Harry M. Stevens, *supra*, where the Board asserted jurisdiction over a racetrack food concessionaire subject to New York state racing commission regulations.

[15] 221 NLRB 1280 (1975).

[16] See Hotel Employees, Local No. 84 (Crazy Horses), Case 8-CP-330, Advice Memorandum dated December 22, 1989, where we concluded that the Board would assert jurisdiction over a food concession operator even though it operated exclusively at a single racetrack. Indeed, in Prairie Meadows, *supra* the Board asserted jurisdiction over an employer that not only operated exclusively at the racetrack, but operated the racetrack itself as an adjunct to its primary casino business.

[17] See also Crazy Horses, *supra*, where the fact that the racetrack and the concessionaire shared an officer/shareholder was determined to be irrelevant to the "integral relationship" analysis.